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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/719,081	11/21/2003	Allan A. Corrin	RAR134.01	2266

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EXAMINER

LEFF, STEVEN N

ART UNIT PAPER NUMBER

1761

DATE MAILED: 10/31/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

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Office Action Summary	Application No.	Applicant(s)	
	10/719,081	CORRIN, ALLAN A.	
	Examiner	Art Unit	
	Steven Leff	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☐ Claim(s) ____ is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 11-32 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on 11/21/03 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|--|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date ____ | 6) <input type="checkbox"/> Other: ____ |

DETAILED ACTION

Election/Restrictions

Restriction to one of the following inventions is required under 35 U.S.C. 121:

- I. Claims 1-10, drawn to a support stick for a food item, classified in class 30, subclass 113.1.
- II. Claims 11-32, drawn to a method and food product, classified in class 426, subclass 134.

The inventions are distinct, each from the other because of the following reasons:

Inventions I and II are related as product and means for use. The inventions can be shown to be distinct if either or both of the following can be shown: (1) the means for using the product as claimed can be practiced with another materially different product or (2) the product as claimed can be used in a materially different process or means of using that product. See MPEP § 806.05(h). In the instant case the support stick product may be used in a materially different process/means, such as supporting materials other than food.

Because these inventions are independent or distinct for the reasons given above and there would be a serious burden on the examiner if restriction were not required because the inventions have acquired a separate status in the art due to their recognized divergent subject matter, restriction for examination purposes as indicated is proper.

During a telephone conversation with Mr. Richard A. Ryan on October 4th, 2006 a provisional election was made without traverse to prosecute the invention of Food Product and Support Stick therefore, claims 11-32. Affirmation of this election must be made by applicant in replying to this Office action. Claims 1-10 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

Specification

The abstract of the disclosure is objected to because it is longer than 150 words. Correction is required. See MPEP § 608.01(b).

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 12-16, 18-23, 25-27, and 29-32 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The above claims 12-16 begin “the support stick according to claim 11...”, however claim 11 is directed to a food product, not a “support stick”, per se. Similarly, dependant claims 18-23, 25-27, and 29-32 also improperly recite “the support stick...” while the claim from which they depend is directed to a food product.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

- Claims 11, 12, 17, and 18 are rejected under 35 U.S.C. 102(b) as being anticipated by Sherman
Sherman (228949) discloses two arms “such that they are adapted to fit against the edge of the stone,” within a peach (col. 1 line 33) and includes two arms which are made of spring steel, “so as to yield somewhat...”(col. 2 line 41) Sherman further discloses “the whole being secured in a suitable handle.” (col. 1 line 31) Sherman recites that the tool is used for a peach, and at the moment that the tool is within the peach, it could be considered a food product as is depicted in fig. 2. In the instance where the tool is within the peach, Sherman teaches all of the limitations taught by the applicant.
- Claims 11, 16, and 17, are rejected under 35 U.S.C. 102(b) as being anticipated by Maruyama

Maruyama (jp-2001037421) describes in describes a stick for supporting food while eating. Maruyama further teaches using the stick with a food that has a core and specifically references “pineapple configuration”. (par. 003) The stick has a handle provided in an outer peripheral portion of an arc-shaped or semi-circular support. Maruyama also teaches the u-shaped support being used to support a food item by

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balancing the weight evenly on the left and right sides, thus creating a core. The food is to be eaten directly off of the support stick.

- Claims 11, 13, 14, 16, 17, 19, and 20, are rejected under 35 U.S.C. 102(b) as being anticipated by Pinchbeck.

Pinchbeck (1638956) teaches “implements or appliances suitable for preparing fruits such as grape fruit or oranges so as to enable them to be easily eaten...consisting of a handle having at one end...two prongs having trident barbed points.” (col. 1 line 1) Sherman further discloses downwardly angled barbs being used to ease entrance into the fruit, and that the arms are “u-shaped”. (col. 2 line 53) In the instance where the tool is within the peach, Pinchbeck teaches all of the limitations.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

- Claims 11-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Maruyama (jp-2001037421) in view of the combination of Sherman (228949) and Pinchbeck (1638956).

Maruyama (jp-2001037421) describes a stick for supporting food while eating. Maruyama further teaches using the stick with a food that has a core and specifically

references “pineapple configuration”. (par. 003) The support stick has a handle provided in the outer peripheral portion of an arc-shaped or semi-circular support. Maruyama also teaches the u-shaped support being used to support a food item by balancing the weight evenly on the left and right sides, thus creating a core. (par. 0018) The food is to be eaten directly off of the support stick.

Maruyama however does not disclose barbs being used to help grip the food item.

Sherman (228949) discloses two arms “such that they are adapted to fit against the edge of the stone,” within a peach (col. 1 line 33) and includes two arms which are made of spring steel, “so as to yield somewhat...”(col. 2 line 41) Sherman further discloses “the whole being secured in a suitable handle.” (col. 1 line 31)

Sherman (228949) does not teach the use of barbs on the inner surface of the two arms for helping to securely grasp the core or pit. Sherman further does not teach eating the fruit off of the stick.

Pinchbeck (1638956) teaches “implements or appliances suitable for preparing fruits such as grape fruit or oranges so as to enable them to be easily eaten...consisting of a handle having at one end...two prongs having trident barbed points.” (col. 1 line 1) Pinchbeck further discloses downwardly angled barbs being used to ease entrance into the fruit, and that the arms are “u-shaped”. (col. 2 line 53)

Pinchbeck however, does not teach the use of flexible arms.

Therefore since Maruyama teaches the idea of using a hand held u-shaped support stick to support a piece of food during consumption, and Pinchbeck and Sherman both disclose the use of a hand held tool for securely grasping the core of a fruit, one of ordinary skill in the art would have been motivated to have combined the teaching of Maruyama, Sherman, and Pinchbeck and have produced a food product which uses a u-shaped support stick which includes barbs for supporting the food. In order to successfully remove the core from a fruit, a secure grip of the core must be obtained. Both Pinchbeck and Sherman disclose using a u-shaped tool for helping to grasp the core of a whole fruit. In order to further increase the ability of firmly gripping the core, Sherman uses arms made of spring-steel which allow the arms to slightly deflect with respect to the core or seed. Pinchbeck includes the use of downwardly angled barbs on his u-shaped arms. The u-shaped arms of Pinchbeck allow for gripping

the core but since the barbs are at a downward angle they will not affect the ability of the arms to move around the core but they will further secure the stick within the fruit. The barbs further help grip the core by contacting it, thus an amount of force would be required to remove the stick from within. Although both Pinchbeck and Sherman are directed to the removal of the core from a fruit, both provide a positive solution to increase the stability of the fruit with respect to the stick and to securely grasp the core. In the instance where the tool is within the peach, Sherman and Pinchbeck both teach all of the limitations taught by the applicant.

The elimination of the final step of removing the core would in effect cause a piece of fruit to be held on a stick by securely grasping the core. Maruyama teaches the use of a u-shaped support stick for food consumption. Omission of a step and its function is obvious if the function of the step is not desired. (see MPEP 2144.04 IIa)

Therefore with respect to claims 11-21 it would have been obvious to one of ordinary skill in the art at the time of the invention by the applicant to have made or produced a food product that is produced by inserting a support stick into a food item with a central core.

- Claim 22 is rejected under 35 U.S.C. 103(a) as being unpatentable over Sherman (228949) in view of Oprean (1913851).

Oprean discloses, "a support stick engages in the bottom of the body for handling purposes." (p.1 col. 1 line 50) Oprean further discloses a "piece of dried fruit..." (pg.1 line 63) inserted on to the stick.

Oprean however does not teach the stick having upwardly extending arms.

Therefore, because Sherman is concerned with the issue of supporting a piece of fruit by its core, and includes arms to facilitate better support of the fruit, one of ordinary skill in the art would have been motivated to have combined the teachings of Sherman and Oprean and have produced a dried food product which included a support stick. Oprean discloses the use of supporting dried fruits on a stick for consumption. Although Sherman makes no mention of drying the fruit prior to inserting the stick, selection of any order of performing process steps is *prima facie* obvious in the absence of new or unexpected results. (see MPEP 2144.04 IVc). Drying the fruit prior to inserting the stick would still produce a food product consisting of fruit on a support stick.

Therefore it would have been obvious to one of ordinary skill in the art at the time of the invention by the applicant to have made or produced a food product which uses a stick with upwardly depending arms as is taught by Sherman, and inserting that stick in a piece of fruit which had been previously dried as is taught by Oprean.

- Claim 23 is rejected under 35 U.S.C. 103(a) as being unpatentable over Sherman (228949) in view of Baker (3950548).

Baker teaches an ice cream and fruit confectionary product. Baker further discloses "the steps of... freezing that banana onto the stick...a plurality of banana/stick combinations. (col.3 lines 67 and 3)

Baker however does not teach the stick having upwardly extending arms.

Therefore, because Baker is concerned with the idea of freezing a banana on a stick so that the frozen banana could be eaten later, one of ordinary skill in the art would have been motivated to combine the teachings of Sherman and Baker and produced a food product consisting of a frozen fruit on a stick. Baker places the banana on a stick in order to provide support while it is being eaten and then placing the banana on the stick in the freezer. Sherman includes arms to better facilitate the support of fruit on the stick, but does not teach the idea of freezing the fruit after the stick is within the fruit. However, selection of any order of performing process steps is prima facie obvious in the absence of new or unexpected results. (see MPEP 2144.04 IVc) The fruit would have to be frozen after inserting the stick, or else it would be considerably more challenging to insert the stick, if not impossible. Further, freezing of fruits supported by a stick for consumption has been well known in the art with regard to frozen fruit bars and popsicles.

Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention by the applicant to have made or produced a food product which uses a stick with upwardly depending arms as is taught by Sherman, inserting that stick into a piece of fruit, and subsequently freezing the food product after the inserting step as is taught by Baker.

- Claims 24, 28 and 29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Oprean (1913851) in view of Boyd (1999533).

Boyd discloses a process of drying prunes which includes “the steps of...the pit is drawn from the stem...(the prune) is now placed in a suitable drier. (col.2 lines 14, and 18).

Boyd however does not teach sticking the dried fruit on a stick for eating.

Because Oprean teaches the idea of using dried fruit on a support stick, one of ordinary skill in the art would have been motivated to have combined the teachings of Oprean and Boyd to have produced a food product consisting of dried fruit on a support stick. Oprean includes the stick so that manual engaging of the fruit is not necessary, while Boyd teaches the general method of drying a piece of fruit which includes a pit. Removing the core of the fruit, drying the coreless fruit, and pressing on a stick would render the same product no matter how the fruit is dried or how it is placed on the stick. The idea that the fruit is compressed around the stick is inconsequential since a certain amount of pressure or compression would be required to adequately accomplish its intended goal of supporting the dried food while it is being eaten.

Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention by the applicant to have made or produced a food product in which you would first remove the core or seeds, dry the food item, and insert a stick into the piece of dried fruit for consumption.

- Claims 25, 26, 30, and 31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Oprean (1913851) in view of the combination of Boyd (1999533) and Sherman (228949).

Neither Oprean nor Boyd teaches the use of a support stick with two arms that form a chamber in between or that the arms are elastic.

Sherman (228949) discloses two arms “such that they are adapted to fit against the edge of the stone,” within a peach (col. 1 line 33) and includes two arms which are made of spring steel, “so as to yield somewhat...”(col. 2 line 41)

However Sherman does not teach the method of drying a piece of fruit and compressing it around a support stick.

However, because Oprean teaches the general idea of supporting dried fruit on a stick to avoid manually engaging the fruit, and Boyd teaches removing the core of a fruit before drying, one of ordinary skill in the art would have been motivated to combine the teachings and produce a dried food product on a support stick.

Supporting food items with a stick, which has a chamber in between the arms, is also well known as is evident by Sherman. The selection of any order of performing process steps is prima facie obvious in the absence of new or unexpected results. (see MPEP 2144.04 IVc) Removing the core of the fruit prior to the drying step, or after the drying step does not change the fact that it is a dried fruit. Further, no matter how the dried fruit is attached to the stick, in order for it to be stable a certain amount pressure or compression would be required in order for the dry fruit to be adequately supported on the stick while it is being eaten.

Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention by the applicant to have made or produced a food product in which you would first remove the core or seeds, dry the food item (Boyd pg. 1 line 13), and insert a stick into the piece of dried fruit, as is taught by Oprean (pg.1 line 63

- Claims 27 and 32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Oprean (1913851) in view of the combination of Boyd (1999533) and Pinchbeck (1638956).

Neither Oprean nor Boyd teaches the use of one or more inwardly directed grasping members.

Pinchbeck (1638956) however teaches "...two prongs having trident barbed points." (col. 1 line 1) With regard to the barbs being inwardly directed, Pinchbeck teaches this in figures 1 and 3.

Therefore, because Pinchbeck teaches the use of angled barbs one of ordinary skill in the art would have been motivated to combine the teachings of Oprean, Boyd and Sherman to have produced a dried food product on a stick. The use of the angled barbs, on the two arms, would allow the tool to more firmly grip the fruit and prevent the stick from sliding out. Further, since the barbs are at downward angles they will not affect the ease of which the arms enter the fruit. Since the core has been removed, a certain amount of pressure or compression will be required in order to adequately accomplish its intended goal of supporting the dried food while it is being eaten. The manner that fruit is dried and attached to the stick does not change the fact that it is dried food on a stick, with the intended goal of adequately supporting the food for consumption.

Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention by the applicant to have made or produced a food product in

which the arms of the support stick, for supporting the dried piece of fruit, include at least one generally inwardly directed grasping member.

Allowable Subject Matter

There is no allowable subject matter at this point.

Conclusion

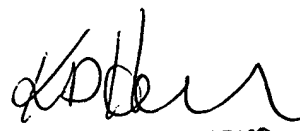
The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. 1468718, 4141578, 5783239, 6199283, 5495794, 3921259, 1123852, 0886510, 2275536, 2351950, 1672718, DE-3538805.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven Leff whose telephone number is (571) 272-6527. The examiner can normally be reached on Mon-Fri 8:30 - 5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571)272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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